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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 80

JOHN E. RING,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY DENIED OCTOBER 11, 1965

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Petition for Rehearing Pursuant to Rule 58

A petition for certiorari to the Appellate Division of the Superior Court of New Jersey was denied October 11, 1965.

The Appellate Division, on appeal from the denial of a motion for acquittal, reversed the conviction for insufficiency of evidence and remanded for new trial over petitioner's objection that there was no motion for a new trial. Application to the Supreme Court of New Jersey for further appeal under the Fourteenth Amendment was denied (see petition P. 13-A).

Petitioner sought certiorari on two grounds: (1) that *Palko* vs. *Connecticut,* holding the Fifth Amendment double jeopardy provision not binding on the states, be reversed, and (2) that remand for new trial then be vacated under the Fifth Amendment double jeopardy provision as applied to the states.

Grounds Not Heretofore Presented

The petitioner now seeks a final acquittal solely under the Fourteenth Amendment.

Due Process

This court in *Gideon* vs. *Wainwright,* 372 U.S. 335 (P. 795) said:

> "The Fourteenth Amendment embraced those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions even though they had been specifically dealt with in another part of the federal constitution."

No fundamental principle of liberty and justice within our criminal jurisprudence is more firmly established than the right of a defendant to an acquittal at the end of the trial if there is insufficient evidence to support the conviction.

The right is mandatory under the New Jersey Rule 3:7-6, similar to the federal rule.

The rule is clearly stated in *Karn* vs. *United States,* 158 Fed. Second 568 Ninth Circuit (1946):

> "The right of appellant to verdict of acquittal fully matured when he made his motion. To remand the case with instructions to grant a new trial would in our judgment be a serious invasion of such rights which accrued to him in the lower court and would strip away without just cause the real effectiveness of a reversal on appeal in cases of this kind."

Recent Cases in the Supreme Court

Acquittal after reversal for insufficiency of evidence has been before this court in three recent cases.

In *Bryan* vs. *United States,* 338 U.S. 552 (1950) remand for a new trial was sustained as "just" under Judicial Code 28 U.S.C.A. 2106 because the defendant also moved for a new trial.

In *Sapir* vs. *United States,* 348 U.S. 373 (1955) the Court of Appeals reversed for insufficiency of evi-

dence, but remanded for a new trial. This court granted certiorari and Per Curiam, without further briefs or arguments, reversed and ordered an acquittal.

Mr. Justice Douglas, in a concurring opinion, distinguished *Bryan* vs. *United States* (supra) saying, P. 374:

> "If petitioner had asked for a new trial different considerations would have come into play, for then defendant opens the whole record for such disposition as might be just."

In *Forman* vs. *United States,* 361 U.S. 416 (1959) the Court of Appeals reversed for insufficiency of evidence and, as in *Sapir* vs. *United States,* first ordered an acquittal and then on rehearing amended the judgment to order a new trial. In sustaining the remand for new trial, the court said, P. 426:

> "Moreover, Sapir made no motion for a new trial in the district court while here petitioner filed such a motion. That was a decisive fact in Sapir's case."

Respondent's Brief

The respondent's brief in opposition to the petition for certiorari (P. 5) conceded that the Fifth Amendment double jeopardy (now abandoned on this rehearing) is binding on the states, but justified a new trial (P. 6) on *Forman* vs. *United States* (supra) and *Bryan* vs. *United States* (supra), which are distinguished by a motion for a new trial.

The brief argued that the right to object to a second trial (P. 5): (1) is a defense which may be expressedly or impliedly waived, and (2) may be lost by the application of the doctrine of "imperious necessity."

There Is No Waiver

The right can be waived only by a motion for new trial, and there was no such motion in the present case.

This court completely overruled the waiver theory in *Green* vs. *United States,* 355 U.S. 184 (1957) holding that an implied acquittal of first degree murder on a conviction of second degree murder was not waived by an appeal. It quoted Justice Holmes' dissenting opinion in *United States* vs. *Kepner* (supra):

> "Usually no such waiver is expressed or thought of. Moreover it can hardly be imagined that the law would not correct a fatal error unless he should waive all rights so important as to be saved by an express clause in the United States Constitution."

State vs. *Lamoreaux,* 20 N.J. Super 65 (1952) relied on by the Appellate Division for the waiver theory, shows the harassment of the New Jersey rule. After reversal for insufficiency of evidence, there were two more convictions and two more reversals by the Appellate Division for insufficiency of evidence, 26 N.J. Super 41 and 29 N.J. Super 204.

We are distinguishing from all other cases in which reversal is sought for improper charges, erroneous

rulings and other errors in which the right to an acquittal has not been established, and reversal of the conviction can be obtained only by asking for new trial.

In *Sapir* vs. *United States,* supra, Mr. Justice Douglas made the same distinction, saying, P. 374:

> "Moreover, a reversal by the Appellate Court on grounds of error that infected the trial would also be different, as Palko vs. Connecticut, 302 U.S. 319, shows. But an acquittal on the basis of lack of evidence concludes the controversy * * * absent a motion by the defendant for a new trial."

The Doctrine of Imperious Necessity

Respondent's brief (P. 8) contends the doctrine of "imperious necessity" applies, since the ends of public justice would otherwise be defeated.

This doctrine, as stated in *Downum* vs. *United States,* 372 U.S. 734 (1963) relates to a second trial after a mistrial, and has no application here.

United States vs. *Tateo,* 377 U.S. 463, relied on by the respondent, has no bearing because the defendant there had not established his right to an acquittal and did seek and was granted a new trial.

There is No Prima Facie Case in the Record

A summons of the police officer, who thought he witnessed a "crime," might justify the first trial. But

after the Appellate Division reverses for insufficiency of evidence, the petitioner is not only presumed innocent, but has been proved innocent. There is no prima facie case on which to detain him or hold him for further prosecution. An order for a new trial on this record violates the principle of the Fourth Amendment:

> "that the right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated and no warrant shall issue, but upon probable cause."

There is no probable cause in this record for a warrant or order for a new trial.

Equal Protection of the Laws

The Appellate Division reversed the petitioner's conviction on *State* vs. *Miller,* 58 N.J. Super 538, an identical case, in which Miller was acquitted. Miller cannot be tried again under the New Jersey Constitution, Article One, Section 11:

> "No person shall, after acquittal, be tried for the same offense."

But petitioner can be tried again because the Appellate Division has held that by appealing from the denial of an acquittal, the petitioner waived his right to win on appeal, the acquittal which the reversal adjudicates to have been improperly denied.

This arbitrary discretional enforcement of the New Jersey Constitution not only denies due process in all respects, but denies equal protection of the laws.

There is No Issue of Fact

The only issue is the right to an acquittal after reversal for insufficiency of evidence, absent a motion for new trial. The statement of the case in the petition for certiorari (Pgs. 3 and 4) and the counter-statement of facts in the respondent's brief in opposition (Pgs. 2 and 4) are substantially identical. The petitioner was convicted of speeding, a criminal offense punishable by fine or commitment to jail, or both, and suspension of driving license. He was fined $100.00 in costs and his license suspended indefinitely.

A minor "crime" should not deter the application of due process and equal protection because the loss of a driver's license can greatly interfere with the petitioner's "liberty" to make a living.

In a concurring opinion in *Gideon* vs. *Wainwright,* supra, Mr. Justice Clark said, P. 349:

> "The Fourteenth Amendment required due process of law for the deprival of 'liberty' just as for the deprival of 'life' and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved."

The Opinion of the Appellate Division Below

The Appellate Division's opinion (petition P. 1-A) said:

> "The county court acknowledged that there was no such proof, but held that since the question had not been raised by the defendant in the municipal

court, it was 'too late for him now (in the county court) to argue that there was something more to try below'."

"We disagree. * * * Defendant's failure to raise the need to prove this essential fact (in the municipal court) cannot be turned into an omission of that fact of a waiver or proof of it (in the county court)."

The Appellate Division then contradicted itself to remand for new trial if the state (county prosecutor) wants one because the petitioner did not raise the point in the municipal court.

The municipal court proceedings were nullified, and the question was raised and ruled upon in the county court, sitting as a court of original criminal jurisdiction, and not as an appellate tribunal, *State* vs. *Fiore,* 69 N.J. Super 122. The prosecutor had notice and opportunity to correct the defect and notice of petitioner's reliance on *State* vs. *Miller,* supra, on which the Appellate Division reversed. He elected to stand on the record. He is entitled to no advantage from the trial court's erroneous denial of acquittal.

In *Brock* vs. *North Carolina,* 344 U.S. 424 (1953) the court held a second trial in the state court after a mistrial was not barred by the Fourteenth Amendment. There were vigorous dissents and in a concurring opinion, Mr. Justice Frankfurter, speaking of the mood of fair dealings and justice which the Fourteenth Amendment exacts from a state in the prosecution of offenders, said (P. 428):

"A state falls short of its obligations when it callously subjects an individual to successive re-

trials on a charge from which he had been acquitted or prevents a trial from proceeding merely to allow a prosecutor who has been incompetent or casual or even ineffectual to see if he can do better the second time."

CONCLUSION

For the foregoing reasons, the petitioner prays that this rehearing be allowed and that the petition for certiorari be granted and that this court issue a final order of acquittal under the Fourteenth Amendment.

Respectfully submitted,

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Certificate of Counsel

I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the foregoing grounds not heretofore presented.

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